No. 85-464

Supreme Court, U.S.
FILED
JUL 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MEYERS INDUSTRIES, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

v.

KENNETH P. PRILL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON DENIAL OF POST-JUDGMENT INTERVENTION

GERARD C. SMETANA
(Counsel of Record)
JOSEPH J. HAHN
ARVEY, HODES, COSTELLO & BURMAN
Suite 3800
180 North LaSalle Street
Chicago, Illinois 60601
(312) 855-5038

On Behalf of Council on Labor Law Equality
Attorneys for Meyers Industries, Inc.

ISSUE PRESENTED

Whether denial of intervention under Rule 15(d) Fed. R. App. P. is an abuse of discretion when, in a National Labor Relations Act case, the successful party before the Board, for good cause, requests intervention after the decision of the Court of Appeals for the limited purpose of seeking review by the Supreme Court of the United States.

Table of Contents

Table of Authorities iii

Opinion Below 2

Jurisdiction 3

Statement of the Case 3

Reasons for Granting the Writ. . . 4

1. The Court of Appeals Abused Its Discretion by Denying Intervention . . 4

2. The Facts of This Case Warrant Intervention . . 11

Conclusion 12

APPENDIX Page

Emergency Motion For Leave to Intervene Out of Time A-1

Order Denying Meyers Industries Motion For Leave To Intervene Out of Time A-8

Emergency Petition For Rehearing *En Banc* and Motion Grant Post-Judgment Intervention *Nunc Pro Tunc* A-9

Order Denying Petition for Rehearing *En Banc* and Motion Grant Post-Judgment Intervention *Nunc Pro Tunc* A-29

Order Denying Emergency Suggestion For Rehearing A-30

Table of Authorities

Cases

Alleluia Cushion Company,
221 NLRB 999 (1975) 5,6

Beth Israel Hospital v.
NLRB U.S. 940 ( ) 10

NLRB v. Acme Industrial Co.,
384 U.S. 925 ( ) 10

Prill v. NLRB, 755 F.2d
941 (D.C. Cir. 1985) 2,3

Wolpe v. Poretsky
144 F.2d 505 (D.C. Cir. 1944) . . . 7

Zuber v. Allen,
387 F.2d 862 (D.C. Cir. 1967) . . . 7

Statutes

National Labor Relations Act,
Section 8; 29 U.S.C. §158 (1982) . . 5

National labor Relations Act,
Section 7; 29 U.S.C. §157 (1982) . . 5

Rules

Rule 15(d) Fed. R. App. P. . . . . Passim
Rule 24 Fed. R. Cir. P. 9

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

MEYERS INDUSTRIES, INC.,

Petitioner,

v.

KENNETH P. PRILL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Meyers Industries, Inc., hereby petitions this Court to issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia to review the decision of that Court which denied Meyers Industries' motions to

intervene after judgment in the case of Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985).

OPINION BELOW

On February 26, 1985, the D.C. Circuit decided the case of Prill v. NLRB which is reported at 755 F.2d 941.

On May 14, 1985, Meyers Industries, although not a party before the D.C. Circuit prior to its decision in Prill v. NLRB, moved to intervene after judgment for the limited purpose of seeking review of that decision (App. 1-7). That motion was denied on May 20, 1985 (App. 8). On May 22, 1985, Meyers Industries submitted a Motion for Reconsideration (App. 9-27) which was also denied on June 11, 1985 (App.28,29).

JURISDICTION

This Court's Jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On May 14, 1985, subsequent to the appellate court's decision in Prill v. NRLB, Meyers Industries moved the D.C. Circuit to intervene after that decision for the limited purpose of petitioning this Court for a Writ of Certiorari. That decision was denied without comment by the Court of Appeals on May 20, 1985. On May 22, 1985, Meyers Industries moved for reconsideration and filed a Suggestion In Banc to D.C. Circuit, both of which were also denied without comment on June 11, 1985.

Subsequently, Meyers Industries has been advised by the Office of the

Solicitor General of the United States that the government does not intend to seek review the underlying decision in Prill v. NLRB.

This Petition asks for review only of the D.C. Circuit's decision to deny Meyers Industries' motions to intervene.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Abused Its Discretion by Denying Intervention.

Meyers Industries' motions to intervene after decision were made for a single reason - to protect its interests as an aggrieved party. Meyers was the charged party in the original proceeding before the Board's Administrative Law Judge at which the Company was found guilty of an unfair labor practice under §158 of the National Labor Relations Act (the "Act").

On review, the Board reversed the ALJ, dismissed the complaint against Meyers Industries, and reversed its previous interpretation of §7 of the Act as established in Alleluia Cushion Company, 221 NLRB 999 (1957), and its progeny.

Because the Company had been successful before the Board it did not intervene under Rule 15(d), Fed. R. App. P. within the 30 days after the charging party filed for review, and instead relied upon the Board to defend its interests. However, the D.C. Circuit, after criticizing the Board's actions, remanded the case to the Board for further action.

Because the Board's, and therefore Meyers Industries', position had not been sustained on review, the Company's interests were again placed in jeopardy

and it petitioned the Court of Appeals for the intervention in order to seek review before this Court.

In Support of its request for post-judgment intervention, Meyers Industries set forth the following justification:

First, Meyers Industries had been a successful party before the NLRB in pursuing its position that the line of cases beginning with Alleluia Cushion Company should be overturned.

Second, that at the time for intervening under Rule 15(d), Meyers Industries was in an impecunious state that prohibited the Company from incurring costs that did not directly affect its ability to stay in business.

Third, The Company's interests were not necessarily the same as the Board's, and thus not protected. This position

has proven accurate to the extent that the Board, through the Solicitor General, has declined to seek review in this case.

Fourth, intervention would not prejudice any of the parties.

In addition, the Company's motions to the D.C. Circuit were based upon the precedent of that Court permitting post-judgment intervention in cases where the continued advocacy by the government was in question. Wolpe v. Poretsky, 144 F.2d 505, 508 (D.C. Cir. 1944), and Zuber v. Allen, 387 F.2d 862, 863 (D.C. Cir. 1967).

Fed. R. App. P. 15(d) provides: "A motion for leave to intervene or other notice of intervention authorized by an applicable statute shall be filed within 30 days of the date on which the petition for review is filed." Because the rule states "shall be filed", an argument

can be made that the application of the 30 day requirement is mandatory. However, the Rule 15 provision for intervention, which applies only to review or enforcement of agency orders, is the only provision for intervention under the Rules of Appellate Procedure. The only other rule relative to intervention in the federal system is Rule 24 of the Fed. R. Civ. P. which permits intervention "upon timely application."

Moreover, the notes of the Advisory Committee on the Appelate Rules indicate that the uniform rule from which Rule 15 was derived closely paralleled Rule 24, and did not fix a time for intervention. Notation was made that a 30 day period for intervention could be found in certain statutes such as the Communications Act Amendments of 1952, 47 U.S.C. §402(e)

and the Sugar Act of 1948, 7 U.S.C. §1115(d). Notes of Advisory Committee on Appellate Rules, reprinted in 28 U.S.C.A., Rule 15, Rules of Appellate Procedure.

We argue that although Rule 15(d) uses the word "shall", the intent was to establish a procedure that would permit the orderly proceeding of a case from petition to decision. It was not intended, nor is it appropriate, to apply this rule to petitions for intervention post-judgment.

More reasonably, the requirement of Civil Procedure Rule 24, permitting timely petitions, because it is workable in situations where a party of right becomes an aggrieved party for the first time after decision of the Appellate Court. Otherwise post-judgment intervention would never be possible - a result contrary to this Courts

approval of intervention in Beth Israel Hospital v. NLRB, 435 U.S. 940 (1978) and NLRB v. Acme Industrial Co., 384 U.S. 925 (1966).

For this reason, we argue this matter, as a question of first impression, claiming that because the standard of "timeliness" should be applied to requests for post-judgment intervention, the Appellate Court should have exercised its discretion when ruling on Meyers Industries' motions for intervention, rather than summarily dismissing the requests because of a literal application of Rule 15(d).

2. The Facts of This Case Warrant Intervention.

As Meyers Industries established in its motions for intervention, the Company became an aggrieved party for the first time after the decision of the Court

of Appeals. More importantly, because of its precarious financial situation and the fact that the Company could rely on the NLRB to defend its interests before the Court of Appeals, the delay in filing the motions for intervention until after the judgment was excusable. Further, the motions to the Court of Appeals set forth clearly that no party would be harmed by late intervention, that intervention was for the limited purpose of protecting Meyers Industries' interests in seeking review of the appellate court's decision before this Court, and that because the Board's interests post-decision were not necessarily the same as those of Meyers Industries, the Company interests could not otherwise be protected. Thus, the Circuit Court's denial of intervention was an abuse of its discretion in applying the Rule.

CONCLUSION

For the above reasons, we respectfully request that a petition for certiorari to the United States Court of Appeals for the District of Columbia be issued, and further, ask the Court to summarily grant intervention so that the petition for certiorari seeking review of the merits of the D.C. Circuit's decision, filed concurrently herewith, in Prill v. NLRB will be determined timely filed and can therefore be

considered by the Court.[1/]

Respectfully Submitted,

Gerard C. Smetana (counsel of record) Joseph J. Hahn
Arvey, Hodes, Costello & Burman
Suite 3800
180 N. LaSalle Street
Chicago, Illinois 60601
(312) 855-5038
On Behalf of the Council on Labor Law Equality
Attorneys for Meyers Industries, Inc.

1/ The instant petition for certiorari is only filed in the event the Court does not grant Meyers Industries' Motion to Intervene. Petitioner was not certain of the appropriate procedure and therefore, has filed for interevention in the alternative so that in either case the Court can consider Meyers Industries' Petition for Writ of Certiorari to review the judgment of the D.C. Circuit in Prill v. NLRB.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KENNETH PRILL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 84 1064
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

EMERGENCY MOTION FOR LEAVE TO INTERVENE OUT OF TIME

Meyers Industries, Inc., by and through its attorneys, Gerard C. Smetana, Joseph J. Hahn and Arvey, Hodes, Costello & Burman, moves this Honorable Court pursuant to Rule 15(d) Fed. R. App. P. to intervene, after judgment, in the above-captioned case for the purpose of preserving the right of Meyers Industries, Inc. to petition the Supreme Court of the United States for a writ of certiorari and for other necessary matters resulting from this Court's decision.

This Court entered judgment in favor of Kenneth Prill on his Petition for Review of an Order of the National Labor Relations Board, 268 N.L.R.B No. 73 (1984). The Board decision at issue reversed an earlier decision of an Administrative Law Judge which had held that Meyers Industries had committed an unfair labor practice by discharging Prill solely because he complained about the unsafe conditions of a company truck and trailer. The Board's decision was based on its reversal of its previous holding in Alleluia Cushion Company, 221 N.L.R.B. 999 (1975) and the cases flowing from that decision. This Court remanded the case to the Board for further review based on its finding that the Board 's holding was not warranted.

Meyers Industries was the successful respondent in the proceedings before the

National Labor Relations Board, but did not participate in the petition for review for two reasons: (1) as a trucking company during the 1980 recession, the company had very serious financial difficulties, which have since been resolved, and chose not to take on additional legal expenses, if possible; and (2) the company's interests at that time were fully represented by the Board.

Meyers Industries asks this Court to permit intervention at this time for several reasons. First, this Court's decision effectively overrules a major decision of the Board, and therefore has broad inpact on Meyers Industries, Inc. and all other employers.

Second, the interests of the Board, the Company and Kenneth Prill are are significantly different. For example, the

Board was required to respond to Mr. Prill's petition before this Court, thus, Meyers Industries was confident that because the Company's position was the same as the Board's, that the Board would vigorously defend and the company's interests would be fully protected. However, at this stage on the proceedings, the Board's interests are not necessarily the same as the Company's. In fact, regardless of the Board's position, the Solicitor General may or may not permit the government to file a Petition for Certiorari, in which case the Company's interests would not be advanced, even though the Company, as the charged party, is now clearly the "person aggrieved" and thus has the statutory right to review under Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. §160(f). Automobile Workers

Local 283 v. Scofield, 382 U.S. 205 (1965).

Third, although the Company was not a party to the proceedings before this Court, intervention at this stage cannot prejudice the rights or position of any of the existing parties. In fact, the denial of intervention would only serve to penalize Meyers Industries for not incurring the expense of protecting its Board victory by assuming full party status before this Court. At this time, the Company is in considerably better financial condition and the Council On Labor Law Equality (COLLE), a non-profit public interest organization, has recently agreed to share in the cost of representing the Company on these matters.

And, finally, this Court and the U.S. Supreme Court have recognized that post-

judgment intervention for the purpose of appeal is timely, even if for the first time, in cases where the intervenor's interest is first placed at risk. See United Airlines, Inc. v. McDonald, 432 U. S. 385, 395 n. 16 (1977); Wol*pe v. Poretsky, 144 F.2d 505 (D.C. Cir. 1944).

This request is limited to post-decision matters and is not intended as a basis to reopen the case before this Court. Meyers Industries intends to file a petition for Certiorari with the United States Supreme Court as soon as possible. The intentions of the Board are not known.

WHEREFORE, it is respectfully requested that this Court grant Meyers Industries the right to intervene in this case for the purpose of petitioning

the United States Supreme Court for a Writ of Certiorari and other matters as may be necessary. Because the 90 day period in which to file a Petition for Certiorari began on February 26, 1985, it is further requested that this Court act on this motion as quickly as possible.

Respectfully submitted,

Gerard C. Smetana
ARVEY, HODES, COSTELLO & BURMAN
180 North La Salle Street
Chicago, Illinois 60601
(312) 855-5038
On behalf of the Council on
Labor Law Equality
Attorneys for Meyers
Industries, Inc.

Of Counsel:

Douglas C. Dahn, Esq.
BARBIER, GOULET, PETERSMARCK,
TOLLESON, MEAD & PAIGE
Professional Corp.
2632 Buhl Building
Detroit, MI 48226
(313) 961-3451

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 84-1064 September Term, 1984

Kenneth Prill

v.

National Labor Relations Board

BEFORE: Wald, Edwards, Bork, Circuit Judges

O R D E R

Upon consideration of the Motion of Meyers Industries for Leave to Intervene Out of Time it is

ORDERED, by the Court that the Motion of Meyers Industries for Leave to Intervene Out of Time is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

By:
Robert A. Bonner
Chief Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KENNETH PRILL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 84 1064
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

EMERGENCY PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC AND MOTION GRANT POST-JUDGMENT INTERVENTION PRO NUNC TUNC

Meyers Industries, Inc., by and through its attorneys, Gerard C. Smetana, Joseph J. Hahn and Arvey, Hodes, Costello & Burman, moves this Honorable Court pursuant to Rules 40 and 35 of the Fed. R. App. P., to reconsider the Court's denial of Petitioner's earlier Motion For Leave to Intervene Out of Time, and grant the motion nunc pro tunc to permit

timely consideration of application to the U.S. Supreme Court of extension of time to file writ of certiorari (see attachment 1).

Meyers Industries, as an employer, was charged by Kenneth Prill with a violation of Section 8(a)(1) of the National Labor Relations Act by interfering with his rights guaranteed under Section 7 of the Act. Although the agency's Administrative Law Judge found the 8(a)(1) violation, the National Labor Relations Board, on review, reversed the findings of the Administrative Law Judge, and found that although Kenneth Prill had been discharged for refusal to drive an unsafe truck, that refusal was not "concerted activity" within the meaning of Section 7 of the Act. At the conclusion of the Board's opinion, Meyers Industries, although the aggrieved party to the Admini-

strative Law Judge's decision, was no longer aggrieved because the Board had dismissed the complaint against the Company. As the basis for its decision the Board overruled its previous decisions beginning with Alleluia Cushion Company, 221 N.L.R.B. 999 (1975), and the cases following the rule of that case.

On review of the agency's decision, this Court disagreed with the Board's position that its definition of "concerted activities" was mandated by statute rather than within the discretion of the Board, and remanded the case to the Board for reconsideration in light of the Supreme Court's recent decision in N.L.R.B. v. City Disposal Systems, ____ U.S. ___, 104 Sup. Ct. 1505 (1984), a case in which the Supreme Court, citing the Board's wide

discretion, upheld the NLRB decision giving a broad interpretation to the term "concerted activities" in a situation where a single employee acted within the umbrella of a collective bargaining agreement. The practical effect of this Court's decision is to place Meyers Industries in a position of extreme vulnerability once again.

1. Meyers Industries' Interest.

At the time of the Board's decision, Meyers Industries' vulnerability was all but eliminated, and, when Kenneth Prill exercised his statutory right to petition this Court for review, the Company concluded that its position would be vigorously defended by the Board's attorneys, and that its efforts, had it timely intervened, would have been duplicative and very expensive. At that time, early 1984, the Company was in a severe financial situation

which required that all costs incurred must be critical to the Company's effort to remain solvent. Moreover, the Company concluded that its interests before this Court were identical with those of the National Labor Relations Board and therefore would be completely protected.

However, this Court's order places Meyers Industries in an extremely difficult position. Although the company had succeeded before the Board, the Board has failed to sustain the common position before this Court. Meyers Industries' argument has consistently been that the Board's 1975 decision in Alleluia Cushion was an improper application of the phrase "concerted activities" in Section 7 of the Act, and therefore should be reversed. Although the Board has taken this same position in its decision and before this Court, it has done

so based upon its view that its definition is mandated by the Act. This Court did not overrule the substance of the Board's decision, rather it concluded that the Board's actions were not mandated but were discretionary, and remanded the case for reconsideration in light of N.L.R.B. v. City Disposal Systems. Because of this, Meyers Industries is uncertain as to the direction the Board will take either before the United States Supreme Court, if it chooses to petition for Writ of Certiorari, or on remand.

Should the Board choose to petition for Writ of Certiorari, a decision that is yet unclear, its legal position could be significantly different than the position the company would take before the Supreme Court. Second, the decision regarding whether to petition is in the

Office of the Solicitor General, not with the Board, and thus beyond the control of Meyers Industries.

Meyers Industries' interests at this point can only be protected by permitting Meyers Industries to intervene for the limited purpose of appeal. The Board may or may not protect the Company's interests, and the manner in which the Board elects to proceed, that is, the legal positions it chooses to take, may not be consistent with the positions Meyers Industries deems critical. For these reasons we consider it clear that the petitioner's interests are truly at stake during the continuation of this litigation.

2. Timeliness of the Intervention:

Meyers Industries, as the charged party in the proceeding before the agency,

is "a person aggrieved" within the meaning of Section 10(f) of the Act, enabling such a party to seek immediate review in the appropriate courts of appeal. U.A.W. v. Scofield, 382 U.S. 205, 210 (1965), and has the right to intervene in the Court of Appeals in any case for enforcement or review of the Board's orders. Id. at 208. Had Meyers Industries intervened pursuant to Rule 15(a), Fed. R. App. P., the Company would be in a position to seek certiorari from the decision of this Court. See Steelworkers v. N.L.R.B., 373 U.S. 908 ( ).

As this Court's decision has been entered, and the time for reconsideration expired, a denial of intervention would serve only to prohibit Meyer Industries from petitioning the United States Supreme Court for Writ of Certiorari. We urge this

Court to reconsider its denial of intervention because, in effect, it penalizes Meyers Industries for its inability to justify the legal expenses necessary to intervene at the time Mr. Prill petitioned for review. Rule 15(d) Fed. R. App. P. permitting intervention to review agency orders, has been traditionally implemented by applying the policies underlying Rule 24 of the Federal Rules of Civil Procedure. See Canadian Tarpoly Company v. U.S. Int'l Trade Commission, 649 F.2d 855, 856 (Cust. & Pat. App. 1981).

The rule provides for intervention as a matter of right within 30 days after the petition for review was filed. Here, the application for intervention is being filed after final decision of this Court. However, it is being filed prior to the end of the period during which the par-

ties can file a petition for Writ of Certiorari.

We ask this Court to reconsider its denial based upon three critical factors: First, Meyers Industries' failure to intervene at the appropriate time is excusable neglect. Second, Meyers Industries' purpose for intervention is only to protect its interests before the United States Supreme Court - interests which may or may not be protected by the National Labor Relations Board. Third, there is no probability of prejudice to already existing parties.

(a) The failure to intervene earlier is excusable. As discussed above, at the time for intervention under Rule 15(a), Meyers Industries was in an impecunious state that did not allow it to expend monies for purposes that did not directly

affect its financial position in a positive way. Moreover, the N.L.R.B., having adopted Meyers Industries' legal positions, was fully capable and did vigorously pursue those interests before this Court. Most importantly, at the present time, the Council for Labor Law Equality ("COLLE"), a non-profit association whose purpose is to protect the legal interests of employers in matters dealing with labor law, has most recently agreed to provide the legal assistance necessary to protect Meyers Industries' interests in this matter. Without COLLE's assistance, Meyers Industries would still not be in a position to be able to afford the expenses involved in petitioning for Writ of Certiorari. The availability of this assistance has only recently been acquired; that is, within the last three weeks, and there-

fore necessitates this petition for intervention, despite the failure, and inability, to intervene at the appropriate time.

(b) Meyer Industries' interests cannot otherwise be protected. As discussed above, the Board's procedural decisions regarding this Court's judgment may or may not protect the interests of Meyers Industries. Certainly, Meyers Industries cannot rely on the Board to raise the issues deemed necessary by the Company or to pursue those issues with any enthusiasm.

(c) Intervention will not prejudice any of the other parties. No delay will be occasioned by permitting Meyers Industries to intervene for the purpose of appeal only. However, time is of the essence inasmuch as the period for peti-

tioning for Writ of Certiorari or applying for an extension of time within which to file such a petition will end on May 27, 1985. The addition of Meyers Industries as a party before the Supreme Court cannot and will not increase the burden of either of the parties other than the possible requirement, if desired, to respond to the issues raised by the Company. There is no additional discovery, no additional witness to be examined, and no further proceedings to be held. The entire appellate process involves briefs to the United States Supreme Court and the limited time for oral argument before the Court.

This Circuit has previously held that in a case where the public body refused to take an available appeal, the public body does not adequately represent the intervenor's interests, and

post-judgment intervention is warranted. See Wolpe v. Poretsky, 144 F.2d 505 (D.C. Cir. 194). Wolpe v. Poretsky has recently been cited with approval by the Supreme Court in United Airlines, Inc. v. McDonald, 432 U.S. 385, 396, n. 16 (1977). While this Circuit has held that a petitioner for post-judgment intervention must make a "strong showing", it has also held that the question of adequate representation on appeal is related to whether the motion is timely. Smuck v. Hobon, 408 F.2d 175 (D.C. Cir. 1969). And, where a public agency such as the Board of Education in Smuck decides not to appeal the trial court's decision, this court has held that the aggrieved non-parties interests would not be adequately represented, thereby justifying intervention after judgment. Id. at 181-182. So too, in this case, the

NLRB is not bound to petition the Supreme Court for Writ of Certiorari, and in any event may not raise or even maintain the issues that were won by the petitioner with the agency below. This uncertainty of adequate representation is sufficient to justify the requested limited intervention in this case.

Second, this position has been the longstanding view of this Circuit as set forth in Zuber v. Allen, 387 F.2d 862, 863 (D.C. Cir. 1967), a case wherein this Circuit permitted post-judgment intervention, noting that although the petitioners appeared to be adequately represented in the District Court by the Justice Department, there was no indication that the Justice Department either contemplated any further effort on appeal, nor was it clear as to the

manner by which the Justice Department intended to protect the interests of the intervenors. Id. at 863. The applicants in this case are in the same position regarding the uncertainty of the government in its efforts to appeal this decision.

Furthermore, the issue at stake herein is whether the Board's action in overruling Alleluia Cushion was mandatory or discretionary. This is a significant issue involving the administration of the National Labor Relations Act. Certainly, the Board's view that the language of the statute removed its decision from the normally broad discretionary standard to a very narrow mandatory standard, thus requiring it to overrule Alleluia Cushion, is a very novel position. Whether it is allowed to stand or is

ultimately reversed this decision will affect employers for a long time. Without question, it is a matter of grave national interest in the field of labor law, and this Court's opinion overruling the Board's method of interpretation of the Act is also a matter without precedent.

3. Suggestion in Banc

The question regarding whether this Court should grant post-judgment intervention touches all parties that are successful in agency proceedings. The small businessman is hard pressed, even in good times, to incur the extraordinary expenses necessary to intervene pursuant to Rule 15(d). Only if aggrieved by the appellate court is the successful party below in a vulnerable position. To require early intervention is tantamount

to imposing a penalty for success before the agency and will no doubt discourage successful litigants from protecting their interests.

Second, because of the previous holdings of this Circuit, as discussed above, which appear to protect aggrieved parties whose interests are either abandoned or placed in jeopardy by an agency's post-judgment decisions, this Court's denial of intervention in this case appears to be a significant reversal of previous precedent.

For these reasons, we urge this Court to consider this matter in banc at the earliest possible time.

Conclusion

We respectfully ask this Court to reconsider its denial of our motion for intervention because the failure to apply

under Rule 15(a) was based upon its decision to avoid the extraordinary expense involved, its knowledge that the Board would protect the decision, and the fact that the petitioner now has the financial relief necessary to permit it to intervene at this time. Moreover, the issues that are of significance to Meyers Industries and all employers cannot be adequately protected by the National Labor Relations Board because the interests of the government and the interests of the private petitioner do not coincide. Finally, there is no prejudice to any of the parties in this case that could result from permitting the petitioner to intervene after judgment for the purpose of appeal only.

WHEREFORE, we respectfully request this Court to reconsider its denial of the petitioner's motion for intervention

under Rule 15(d), and if granted, that the Court's order permit intervention Nunc Pro Tunc to be effective as of the date of application in order to permit the petitioner to timely file a petition for Writ of Certiorari with the United States Supreme Court.

Respectfuly submitted,

_____

Gerard C. Smetana
Attorney for Petitioner

ARVEY, HODES, COSTELLO & BURMAN
180 North La Salle Street
Chicago, Illinois 60601
(312) 855-5038

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 84-1064 September Term, 1984

Kenneth Prill

v.

National Labor Relations Board

BEFORE: Wald, Edwards, Bork, Circuit Judges

Spielberg Fleischer
268 NLRB No. 73

O R D E R

Upon consideration of the emergency petition for rehearing of Meyers Industries, Inc., filed May 23, 1985, it is

ORDERED, by the Court that the petition for rehearing is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

By:
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 84-1064 September Term, 1984

Kenneth Prill

v.

National Labor Relations Board

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

O R D E R

The emergency suggestion for rehearing en banc of Meyers Industries, Inc., filed May 23, 1985, has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court en banc, that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER, CLERK

By:
Robert A. Bonner
Chief Deputy Clerk

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

(4) (2)

Nos. 85-463 and 85-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MEYERS INDUSTRIES, INC.,
Petitioner,

v.

KENNETH P. PRILL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

ELLIS BOAL
(Counsel of Record)
925 Ford Building
Detroit, MI 48226
(313) 962-2770
Attorney for Respondent
Kenneth P. Prill

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. PETITIONER HAS NO STANDING TO SEEK CERTIORARI OR MOVE TO INTERVENE IN THESE CASES	1
II. THE COURT BELOW ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONER'S UNTIMELY MOTION TO INTERVENE	2
III. THE ISSUE PETITIONER SEEKS TO LITIGATE IS NOT RIPE FOR REVEW	3
IV. CONCLUSION	4

TABLE OF AUTHORITIES

CASES: Page

Center Ridge Co., 276 NLRB #15 (1985) 3
Eastex, Inc. v. *NLRB*, 437 US 556 (1978) 3
Ewing v. *NLRB*, —— F2d ——, 119 LRRM 3273 (CA 2, 1985) 3
NLRB v. *City Disposal Systems, Inc.*, —— US ——, 104 S Ct 1505 (1984) 3
Prill v. *NLRB*, 755 F2d 941 (CADC, 1985) 3

STATUTE:

National Labor Relations Act 3

COURT RULES:

FRAP Rule 15(d) 2
Supreme Court Rule 17 3
Supreme Court Rule 19 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-463 and 85-464

MEYERS INDUSTRIES, INC.,
Petitioner,

v.

KENNETH P. PRILL,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

I. PETITIONER HAS NO STANDING TO SEEK CERTIORARI OR MOVE TO INTERVENE IN THESE CASES.

Petitioner Meyers Industries seeks certiorari in a case where it is not a party to the proceeding below. Rule 19 of the Supreme Court's rules is quite clear that only parties to a proceeding in a court of appeals may seek certiorari to that court for claimed errors. Meyers is at this stage an interloper and its petitions should both

be denied. Similarly, its motion to intervene should be denied.

II. THE COURT BELOW ACTED WELL WITHIN ITS DISCRETION IN DENYING PETITIONER'S UNTIMELY MOTION TO INTERVENE.

The proceeding in the court below began on February 21, 1984, when Respondent Prill filed his petition for review in the court of appeals. FRAP Rule 15(d) requires that Meyers, were it interested in the proceeding, should have intervened within 30 days of that date. Meyers declined to do so. Instead, it waited until 2½ months after the court of appeals' decision on the merits on February 26, 1985, to move to intervene. The court unanimously denied the motion, and then unanimously denied a petition for rehearing, a suggestion for rehearing en banc, and a motion to grant post-judgment intervention nunc pro tunc.

Rules are rules, and Prill is entitled to the benefit of them. Meyers offers unverified and purportedly equitable reasons why the 30-day time limit should have been waived: (i) its own financial difficulties, and (ii) its belief that the NLRB would adequately represent its interests in this case. The short answer to both of these is that Meyers could have intervened timely and then filed a letter brief endorsing the brief of the NLRB. It would then have the standing it seeks today.

Meyers' petition to the Supreme Court is entirely different from an appeal from a lower tribunal to a court of appeals. Thus, Meyers' arguments concerning "protecting its interests" in the Supreme Court evaporate. A party in litigation gets only two bites of the apple: trial and appeal. The law Meyers cites might be convincing if it concerned Meyers' untimely intervention in a district court so it would have access to a court of appeals. But a party has no "interest" to protect after a court of appeals decision. The Supreme Court takes cases which interest it, not us. There is no right to certiorari.

Finally, the national interest in this matter is adequately protected by the Solicitor General, who has in this case decided not to proceed in the Supreme Court. Prill agrees with that decision, and so evidently did the court of appeals. This decision was entirely within its discretion. Meyers' petition in No. 85-464 should be denied.

III. THE ISSUE PETITIONER SEEKS TO LITIGATE IS NOT RIPE FOR REVIEW.

Rule 17 of the Supreme Court rules outline the factors governing consideration of certiorari petitions. None of them apply here. First, there is no split in the circuits. Both *Prill* v. *NLRB*, 755 F.2d 941 (CADC, 1985), and *Ewing* v. *NLRB*, —— F.2d ——, 119 LRRM 3273 (CA2, 1985), reached the identical result in this case. That result was that the rule the Board promulgated in its decision below was not mandated by the National Labor Relations Act and was without adequate rationale (App. 46, 111) Moreover, there is no possibility of employers and employees having different obligations within different circuits, because the Board is continuing to adhere to the standard it articulated below pending the remand proceedings. See e.g., *Center Ridge Co.*, 276 NLRB #15 (1985).

Second, there is no conflict with any decision of this Court. To the extent that the Supreme Court has spoken to the issues raised here, it has supported the position of Prill. *NLRB* v. *City Disposal Systems, Inc.*, —— U.S. ——, 104 S. Ct. 1505 (1984;) *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978).

Finally, the court of appeals did not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. It noted that the Board's opinion in this case "contains not a word of justification for its new standard in terms of the policies of the statute" (App. 83), and remanded to let the Board take another

crack at it. On September 27, 1985, the Board received statements of position from all the parties, including Meyers Industries itself,[1] and is presumably about to render a decision. That decision could come at any time, possibly even before this Court acts on the certiorari petition.

After the Board's decision on remand, in which it presumably will thoughtfully exercise its full measure of discretion and expertise, the parties will have another opportunity to bring the matter back for review in the circuit court. That is where review properly lies. Dissatisfied parties thereafter can then come here, when the issues would be ripe. This Court would then be able to make a more informed decision. The court of appeals has thus acted with the greatest caution and consideration for the Board's and Meyers' interests. Meyers' petition in No. 85-463 should be denied.

IV. CONCLUSION

If the Board had considered the issues of this case thoughtfully in the first instance, and if Meyers itself had been sufficiently interested to intervene in the court of appeals, there might be call for Supreme Court intervention. The time may yet come when this Court will have the chance to decide it. But that should await another day.

For these reasons, both petitions for writs of certiorari should be denied.

Respectfully submitted,

ELLIS BOAL
(Counsel of Record)
925 Ford Building
Detroit, MI 48226
(313) 962-2770
Attorney for Respondent
Kenneth P. Prill

[1] Meyers also moved before the Board to stay consideration until the instant petitions are disposed of. Prill is opposing that motion.